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No. 83-1704

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In the Supreme Court of the United States

OCTOBER TERM, 1983

HENRY E. HILDEBRAND, III,
STANDING CHAPTER 13 TRUSTEE, PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

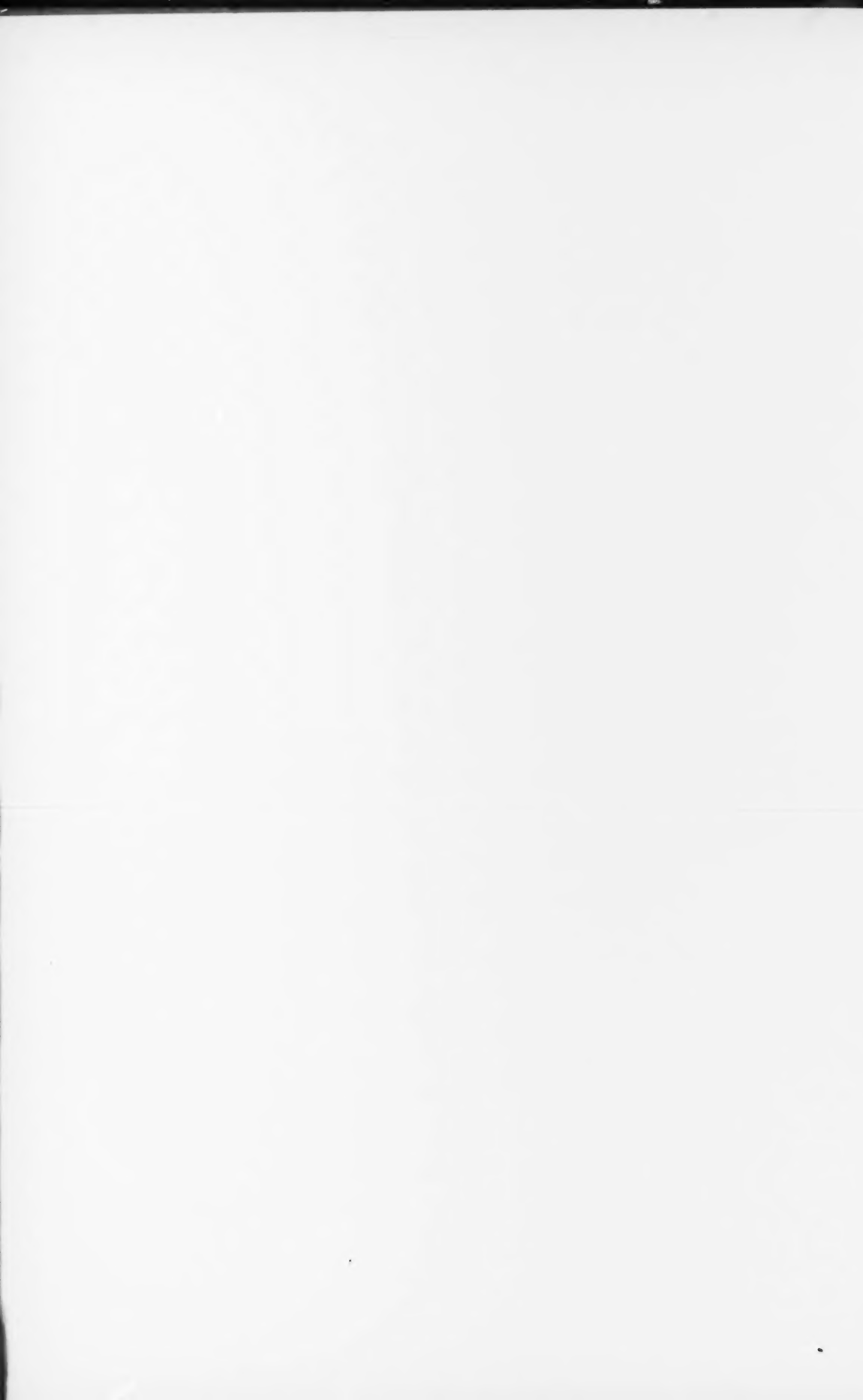
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Petitioner contends that 42 U.S.C. 407, the anti-assignment provision of the Social Security Act, does not prohibit a bankruptcy court from entering an income deduction order directing the Social Security Administration (SSA) to pay all or part of a debtor's social security benefits directly to the bankruptcy trustee to help fund a plan for repayment of debts under Chapter 13 of the Bankruptcy Code, 11 U.S.C. 1301 *et seq.*

1. Seven individuals who receive either social security disability payments under Title II of the Social Security Act, 42 U.S.C. (& Supp. V) 401-433, or Supplemental Security Income (SSI) benefits under Title XVI of the Act, 42 U.S.C. (& Supp. V) 1381-1383, filed voluntary petitions under Chapter 13 of the Bankruptcy Code with the United States Bankruptcy Court for the Middle District of

Tennessee. The court ordered the government to send the benefits in each case directly to petitioner, the standing trustee for Chapter 13 cases in that district. (*In re Buren*, 4 Bankr. 109; Pet. App. 28a-37a). The district court affirmed on appeal by the government (Pet. App. 18a-26a; 6 Bankr. 744). Both courts found that the Bankruptcy Reform Act of 1978 evinced an intent to subject the government to such income deduction orders in connection with Chapter 13 plans. Specifically, 11 U.S.C. 1325(b) provides that the bankruptcy court may order "any entity," which is defined to include a governmental unit (see 11 U.S.C. 101(14) and (21)), from whom the debtor receives income to pay that income to the trustee. See Pet. App. 19a-20a, 28a-31a.

2. The court of appeals reversed (Pet. App. 1a-15a; 725 F.2d 1080). The court held that Section 207 of the Social Security Act, 42 U.S.C. 407, which provides that "none of the moneys paid or payable or rights existing" under Title II of the Act "shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law;"¹ was not repealed by implication by the Bankruptcy Reform Act of 1978. Hence, existing law prohibited the income deduction orders entered by the bankruptcy court. The court of appeals stated that repeals by implication are highly disfavored and that the circumstances here did not support such a repeal. The court relied in particular on the facts that there is no "positive repugnancy" between the statutes, that the later statute addresses a different subject than the first and cannot be considered a substitute for the Social Security Act, and that 42 U.S.C. 407 is not included in the long list of statutes expressly repealed by the Bankruptcy Reform Act of 1978. See Pet. App. 11a-14a.

¹This provision is made applicable to the SSI program by 42 U.S.C. 1383(d)(1).

In addition, the court of appeals relied on an amendment to Section 207 enacted in April 1983. That amendment added a new subsection (b) to 42 U.S.C. 407 to make it unequivocally clear that Section 207 has not been repealed by implication by any intervening legislation.² The court found that this amendment, while not dispositive of this case because it was not given retroactive effect,³ further supported the court's conclusion because it "strongly indicates that Chapter 13 was never intended to allow" income deduction orders in connection with social security payments (Pet. App. 15a).

3. Plainly, there is no reason for this Court to review the decision below. The 1983 amendment codifies the precise result reached by the court of appeals, and therefore there can be no doubt whatsoever that social security benefits henceforth may not be subject to Chapter 13 income deduction orders. The only question conceivably left open by the amendment is the validity of income deduction orders entered prior to April 1983. The court of appeals apparently assumed that the prospective nature of the amendment precluded its application to preexisting income deduction

²The new subsection provides:

(b) No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

Pub. L. No. 98-21, § 335(a), 97 Stat. 130. The Conference Report on the amendment states that this amendment is designed specifically to prevent the bankruptcy courts from issuing Chapter 13 income deduction orders to SSA. H.R. Rep. 98-47, 98th Cong., 1st Sess. 153 (1983).

³Section 335(c) of the law amending 42 U.S.C. 407 provides: "The amendments made by subsection (a) shall apply only with respect to benefits payable or rights existing under the Social Security Act on or after the date of the enactment of this Act." 97 Stat. 130.

orders. Even if that view were correct,⁴ the issue presented here is of virtually no continuing significance. By the time this case would be decided by this Court, most of the Chapter 13 repayment plans confirmed prior to April 1983 would no longer be operating,⁵ and hence there would be few outstanding pre-April 1983 orders directing the payment of social security benefits directly to the bankruptcy trustee.⁶

In any event, quite apart from the operation of the 1983 amendment, the decision below is correct. The amendment itself strongly indicates that Congress never intended to

⁴In our view, even orders entered prior to April 1983 cannot be enforced after April 1983 because the amendment by its terms applies to "benefits payable * * * under the Social Security Act on or after the date of the enactment of this Act." Pub. L. No. 98-21, § 335(c), 97 Stat. 130. Thus, while the prospective nature of the amendment would prevent recoupment of monies paid to trustees prior to April 1983, it would appear to justify SSA's refusal to make such payments after the effective date. This issue, however, was not litigated in the court of appeals and is not presented here.

⁵In the absence of special court approval, for cause, the maximum permissible length of a Chapter 13 repayment plan is three years. 11 U.S.C. 1322(c).

⁶For this reason, the alleged conflict between the decision below and *United States v. Devall*, 704 F.2d 1513 (11th Cir. 1983) (see Pet. 6), does not warrant review. Moreover, it is questionable, in light of the 1983 amendment, whether the Eleventh Circuit would follow *Devall* in the unlikely event that this issue involving the validity of a pre-amendment order were to arise again. *Devall* was decided shortly after the 1983 amendment was enacted, and the court evidently was unaware of the amendment. The court subsequently declined to reconsider its decision, stating that the amendment should be brought to the attention of the bankruptcy court in the first instance. 714 F.2d 1068 (11th Cir. 1983). Thus, it is possible that the Eleventh Circuit, as did the court below, would find that the passage of the 1983 amendment indicates that Congress never intended to permit assignment of social security benefits to a Chapter 13 bankruptcy trustee, or, alternatively, that a preexisting income deduction order, even if valid when issued, would no longer be effective after April 1983.

repeal 42 U.S.C. 407 in connection with Chapter 13 plans. And, given the failure of the Bankruptcy Reform Act of 1978 to address social security explicitly or to include 42 U.S.C. 407 in the list of statutes repealed, ordinary principles of statutory construction militate against finding an implied repeal here. See Pet. App. 11a-14a. As the court of appeals explained (*id.* at 12a), the assignment of social security benefits to the trustee is hardly essential to the operation of Chapter 13; the same result can be achieved by having the debtor sign over his social security check to the trustee.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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